

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
v.)
DANIEL W. McELROY and)
AIMEE J. KING McELROY)
)

DEFENDANTS, DANIEL W. MCELROY AND
AIMEE J. KING MCELROY MEMORANDUM IN SUPPORT OF THEIR
RENEWED MOTION FOR JUDGMENT OF
OF ACQUITTAL

The Defendants, Daniel W. McElroy and Aimee J. King McElroy, submit the following Memorandum in Support of Their Renewed Motion for Judgment of Acquittal on all counts.

A) The Evidence was Insufficient to Show that Daniel and Aimee McElroy Were Members of the “Klein” Conspiracy that was Alleged in Count One of the Indictment.

At trial the government failed to introduce any direct evidence that the Defendants, Daniel and Aimee McElroy knew and/or approved of the agreement not to pay the appropriate employment taxes for the workers of Daily A. King, Pro Temp and Precision Temp Corp. There was no evidence introduced about either Defendant participating in any conversation that taxes were not being withheld and/or paid for the employees of Daily A King, Pro Temp or Precision Temp Corp.

The government's only attempt to prove this essential element was evidence, that taken in the light most favorable to the government, showed that the Defendants only knew that there was a cash payroll. However, the Court instructed the jury that paying workers in cash was not

illegal. Consequently this circumstantial evidence was insufficient to prove the Defendants made an agreement to participate in a "Klien" Conspiracy.

B) The Proof of The Mail Fraud Conspiracy Alleged in Count One of the Indictment Failed to Prove The Defendants Made an Agreement To Fraudulently Reduce the Premiums for Workers Compensation Insurance for Daily A King, Pro Temp, and Precision Temp Corp.

The evidence at trial to prove the Defendants' agreement and participation in the mail fraud conspiracy came from the testimony of Charles Wallace ("Wallace"). On February 7, 2008 on direct examination Wallace testified about this issue in pages 81 through 94. The testimony is attached hereto as Exhibit One. This testimony in the light most favorable to the government only shows that both Defendants discussed workers compensation premiums with Wallace about Daily A King and that the Defendant, Daniel McElroy, had discussions with Wallace separately about workers compensation premiums for Pro Temp. In none of this testimony does Wallace allege that the McElroys knew he would be submitting false payroll tax information to the insurance companies.

During cross-examination on February 8, 2008 on pages 41 through 47, attached hereto as Exhibit Two, Charles Wallace testified that he initiated the idea to provide false tax returns to insurance companies to reduce the workers compensation premiums and that Wallace testified that during and after this conversation Aimee McElroy and Daniel McElroy said nothing. Wallace only testified that Daniel McElroy nodded his head.

This evidence taken in the light most favorable to the government is insufficient as a matter of law to demonstrate the agreement prong of the mail fraud conspiracy.

C) The Evidence Offered Against Aimee McElroy in Counts Two and Three is Insufficient.

Count Two is an alleged mail fraud concerning Pro Temp and Count Three is an alleged mail fraud concerning Precision Temp Corp. Charles Wallace never testified he had any conversations with Aimee McElroy about either Pro Temp or Precision Temp workmans compensation insurance premiums. On this fact alone there was insufficient evidence for Counts Two and Three to show that Aimee McElroy was part of any substantive mail fraud crime for either Pro Temp or Precision Temp.

D) There was Insufficient Evidence Introduced at Trial to Show That The Mailings Alleged in Counts Two, Three and Four Were Mailed.

Exhibit 228B represents the mailing for Count Two and Exhibit 229A represents the mailing for Count Three. These Exhibits were introduced through Michael Hayes; however Mr. Hayes testified that he had no personal knowledge whether these exhibits were mailed. In order to overcome this failure of proof the government never introduced any evidence that the exhibits were received and/or found at the offices of Daily A King during the search. Also, the insurance broker never testified that these documents were received via the mail.

Exhibit 207C represents the mailing for Count Four. This exhibit was introduced through Joseph Dirico. Mr. Dirico never testified that he or anybody else mailed the exhibit and the government introduced no evidence that the exhibit was received via the mail by Daily A King.

Clearly, the element of the mailings was not met for Courts Two through Four.

E) The Evidence was Insufficient to Show for Counts Two through Four that the Defendants, Daniel and Aimee McElroy Participated in a Scheme to Defraud.

For the reasons set forth in Section B above, there was insufficient evidence as a matter of law to demonstrate the Defendants participated in a scheme to defraud as alleged in Counts Two through Four.

F) The Evidence was Insufficient to Show that the Defendants, Daniel and Aimee McElroy for Counts Five through Twelve Willfully Aided and Assisted and Procured False 941 Tax Returns for Daily A King.

For the reasons set forth in Section A above the evidence was insufficient to prove the Defendants aided or assisted in the procuring of false 941 tax returns for Daily A King because there was no evidence introduced at trial that the Defendants knew that the 941 returns for Daily A King were false. Charles Wallace was the central witness who testified about this issue. His transcripts from February 7 (page 45) and 8, 2008 (pages 48 through 61) are attached hereto as Exhibits Three and Four. This testimony clearly reflects that all of Daily A King's cash payments were reflected on its corporate returns as contract labor. Wallace also testified that these amounts were supposed to be accounted for in the 941 tax returns of Pro Temp and Precision Temp Corp.

Also, the IRS summary witness, Joseph Guidoboni, agreed that the amounts of the contract labor payments reflected on Daily A King corporate tax returns were properly accounted for, and therefore should have been reflected on the 941 tax returns for either Pro Temp or Precision Temp Corp.

For all of these reasons it is clear that the evidence as a matter of law on Counts Five through Twelve was insufficient.

G) The Evidence was Insufficient For Counts Five Through Twelve Because the 941 Tax Returns for Daily A King Were True.

For the reasons set forth in Section F above, the evidence in the light most favorable to the government demonstrated that Daily A King's 941 tax returns were not false but truthful. Consequently, the evidence offered at trial on these Counts was insufficient.

H) The Evidence Was Insufficient for Counts Thirteen Through Eighteen.

The evidence introduced at trial was insufficient to sustain a conviction for Counts Thirteen through Eighteen for the reasons set forth in Sections A, F, and G above.

The evidence is very clear that the Defendants never participated in any conversation about not paying proper taxes for Pro Temp. In addition, as Charles Wallace and IRS Agent Guidiboni testified the corporate taxes of Daily A King properly reflected the cash payments to Pro Temp and Precision Temp Corp. Further, the obligation to account for Pro Temp's employment taxes on its 941 returns was the responsibility of Charles Wallace. Wallace testified that he signed all of the 941 returns for these Counts and never consulted the Defendants about them. There was no evidence that the Defendants aided or assisted in the procurement of these false returns. In addition, there was no evidence that the Defendants knew that Pro Temp's 941 tax returns did not include the entire cash payroll.

In summary, there was no evidence that the Defendants in anyway aided or assisted in the procuring of the false returns.

CONCLUSION

For the reasons set forth herein the Defendants assert that the Court, as a matter of law, must enter a Judgment of Acquittal on all counts because the evidence in the case was insufficient to sustain the convictions.

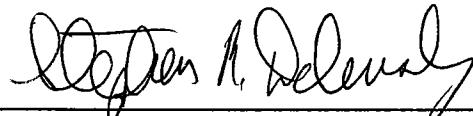
Respectfully submitted:
AIMEE J. KING McELROY
By her attorney,



Jack I. Zalkind (BBO# 538840)
One International Place
Boston, MA 02110
Telephone No. (617) 227.3950

DATED: March 6, 2008

Respectfully submitted
DANIEL McELROY,
By his attorney,



Stephen R. Delinsky (BBO# 119120)
ECKERT SEAMANS, CHERIN & MELLOTT, LLC
One International Place, 18th Floor
Boston, MA 02110
Telephone No. (617) 342.6800

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on 3-6-08
By: S. Delinsky

EXHIBIT ONE

1 A Yes.

2 Q Were those filed every year?

3 A Yes.

4 Q For company by company -- well, for Daily A. King, were
5 they filed every year?

6 A Yes.

7 MR. MITCHELL: May I have one moment, Your
8 Honor.

9 Q One thing to clarify on this Exhibit right here, 122,
10 what does the figure in line 2 represent, the 2 million, 600
11 some odd thousand dollar figure?

12 A All payroll checks issued by Daily King for the period
13 July 1, of 1998 through September 30, 1998.

14 Q So it's the check payroll?

15 A Yes.

16 Q And is that the way you did it every time with these
17 941s?

18 A Yes. Start Here

19 Q Were you responsible for providing information to the
20 temp company's worker's compensation insurers?

21 A Yes.

22 Q Would you describe generally what the responsibilities
23 were?

24 A To meet with the workman's comp auditor and to give them
25 whatever records that they requested on their initial letter

1 or intent to audit.

2 Q Okay. And did you provide the auditors complete and
3 accurate information?

4 A No.

5 Q What didn't you provide them?

6 A They were not provided the cash payroll, and they were
7 not provided the full amount of check payroll as well.

8 Q How did you determine how much payroll information to
9 give them?

10 A It would be based upon how much insurance premium wanted
11 to be paid that year.

12 Q Okay. And how was that determined?

13 A I was usually given a number.

14 Q By whom?

15 A Dan and Aimee.

16 Q Okay. And were these in discussions with Dan and Aimee?

17 A Yes.

18 Q Was this something that happened every year?

19 A Yes.

20 Q For each insurance policy?

21 A Yes.

22 Q Were there policies that were taken out separately in
23 the name of Pro Temp?

24 A Yes.

25 Q Did you have discussions also about Pro Temp policies?

1 A Not with Aimee.

2 Q Okay. With whom did you have those discussions?

3 A Just with Dan.

4 Q So Daily A. King -- excuse me, the discussions
5 pertaining to Daily A. King's insurance rates were with both
6 Aimee and Dan?

7 A Yes.

8 Q And Pro Temp, just Dan?

9 A Yes.

10 Q How were these, how were the figures arrived at,
11 generally?

12 A Which figures?

13 Q In any given year, was there a certain -- how did they
14 convey the number to you?

15 MR. ZALKIND: Objection, Your Honor. He keeps
16 on using the word "they." If these were joint
17 conversations, I have no objection.

18 THE COURT: Good point.

19 Q In joint conversations you had, how was the figure
20 conveyed to you?

21 A Conveyed to me?

22 Q Yeah. What did, in the joint conversations about Daily
23 A. King's insurance policies, either Dan or Aimee tell you
24 how much they wanted to pay?

25 A Yes. If I'm going to bill for, hypothetically,

1 \$200,000, it will be usually said that's too much money.

2 MR. ZALKIND: Excuse me, Your Honor. Can we
3 find out who said it?

4 THE WITNESS: Well, I don't remember which one
5 said it.

6 MR. ZALKIND: Then I ask it be stricken, Your
7 Honor.

8 THE COURT: I thought you testified it was a
9 joint conversation with all three of them. Motion to strike
10 is denied.

11 Q Can you resume your answer?

12 A Around half will be good, half of the 200,000.

13 Q Okay. And how did the discussions go when it was just
14 Pro Temp and you were discussing it would Dan McElroy?

15 A Just Dan.

16 Q Yeah.

17 A Just say, we got a bill in for workman's comp. We would
18 follow the same process of showing what numbers were
19 necessary.

20 Q Did you discuss with them how you arrived at that
21 target, at a given target figure?

22 A What I said would be, that we would have to have payroll
23 records to back up whatever numbers we used.

24 Q Okay. Did you explain to them how you would arrange
25 those payroll figures to back up the target figure?

1 A I'm not sure if I discussed that with both of them. I
2 just don't remember.

3 Q Okay. How did you arrange the payroll figures to arrive
4 at the target insurance premium?

5 A I would figure out on a weekly basis, figure out, first
6 of all, how much payroll by category would be needed to
7 generate the kind of premium that wanted to be paid, and
8 then you would break that down further to a weekly basis of
9 payroll to arrive at the number needed for that premium.

10 Q Is that in the accounting business referred to as
11 backing into a number?

12 A I suppose.

13 Q Did you do this for each policy?

14 A Yes.

15 Q For both Pro Temp and Daily A. King?

16 A I don't remember what happened with Pro Temp.

17 Q Well, let me ask you, let me ask you about Precision.
18 Was Precision Temp insured?

19 A Yes.

20 Q Are you sure about that?

21 A As far as I knew they were, yes.

22 Q What I'm asking you is the process. Was the process you
23 used to come up with the figure the same for each of the
24 policies?

25 A When you sign up for the policies in the beginning, it's

1 an estimate. Your renewal is also an estimate.

2 MR. DELINSKY: I'm sorry, I didn't hear that.

3 A Your renewal is also an estimate, and the renewal is
4 usually based upon the previous years. So starting with
5 which company you want me to talk first?

6 Q Talk Daily A. King.

7 A All right. Originally, the first year we gave an
8 estimate on the premium -- on the payroll, as far as what it
9 would be for the year.

10 Q You gave an estimate?

11 A And then we usually, they would come out and do an
12 audit. I use the word usually because there are some
13 insurance companies that sent you a mail questionnaire to
14 fill out, and you responded back about your payroll numbers
15 through the mail.

16 I don't remember if that ever happened with Daily
17 King or not.

18 Q Do you remember it happening with Pro Temp?

19 A I believe it happened one year with Pro Temp. I could
20 be wrong. I just don't remember.

21 Q Okay. Again, coming up with the payroll figures, would
22 you document it somehow?

23 A Yes. I would set up a spreadsheet by week that would
24 fall into the time period of the policy. If the policy ran
25 from 9/6/98 to 9/6/98, then that's how the spreadsheet would

1 have been made up on a weekly basis.

2 Q Okay. I'll have you -- I'm going to have you take a
3 look at some Exhibits. 352, 352A-E. Can you find those?

4 Have you had a chance to look at those documents?

5 A Yes.

6 Q Okay. Do you recognize those documents?

7 A Yes.

8 Q What are they?

9 A The first two Exhibits, 352 and 352A represent a
10 reproduction of the summary totals by quarter of the
11 spreadsheets that I would have created for the workman's
12 comp policy.

13 Q Okay, and what about the other documents?

14 A Exhibits 352B, C, D and E are copies of 941s for Daily
15 King Labor for the period third quarter '98, fourth quarter
16 '98, first quarter '99 and second quarter '99.

17 Q Do those 941s relate to the two payroll sheets that are
18 Exhibits 352 and 352A?

19 A These quarterlies tie out to the payroll summaries that
20 were in the first two Exhibits.

21 MR. MITCHELL: At this time, Your Honor, the
22 government would offer Government Exhibits 352, 352A-E.

23 MR. DELINSKY: No objection.

24 MR. ZALKIND: No objection, Your Honor.

25 (Government's Exhibit No. 352, 352A-E received in

1 evidence.)

2 Q In coming up with these payroll sheets, did you also
3 create other documents to substantiate the lower payroll
4 that you were submitting to the auditors?

5 A It would be a spreadsheet with like 52 weeks on it,
6 similar to Exhibit 352.

7 Q Okay. Did you provide the insurance auditors with 941s?

8 A Yes.

9 Q Okay. Were those the same 941s you filed with the IRS?

10 A I'm sorry, I didn't hear you.

11 Q Were those the same 941s that you filed with the
12 Internal Revenue Service?

13 A No.

14 0 They were different.

15 A Yes.

16 Q Were the figures in the 941s you submitted to the
17 insurers, lower or higher than those on the ones you filed
18 with the Internal Revenue Service?

19 A Lower.

20 MR. MITCHELL: Your Honor, at this time I'd
21 like to read a stipulation.

22 THE COURT: All right.

23 MR. MITCHELL: "Stipulation 18, Government's
24 Exhibits 352 and 352A-E are two spreadsheets labeled Daily
25 A. King Labor of Worker's Comp 1998, 1999, and IRS Forms 94

1 for Daily A. King Labor, Inc. for the quarters ending in
2 9/30/98, 12/31/98, 3/31/99, 6/30/99 that were found attached
3 together in Aimee King McElroy's office, Room C at 14EG
4 Bristol Drive, Easton, Mass. on June 26, 2001."

5 Q Now, the 941s that are labeled Exhibits 352B-E, are
6 those, the payroll figures on those, lower than the ones
7 that you filed for those corresponding months with the IRS?

8 A Yes.

9 Q I'll have you look at two documents.

10 Displayed on the screen is Exhibit 122. Remember
11 that 941 that you just walked us through a few minutes ago?

12 A Yes.

13 Q Okay. Is that the one you filed with the Internal
14 Revenue Service?

15 A Yes.

16 Q Again, which quarter?

17 A Quarter ending September 30, 1998.

18 Q That's the third quarter of the year, right?

19 A Yes.

20 Q Going to show you -- do you see the other document that
21 I've flashed up on the screen, Mr. Wallace?

22 A Yes.

23 Q That's Exhibit 352B?

24 A Yes.

25 Q Is that a 941 for the same quarter?

1 A Yes.

2 Q That the one that you submitted to the insurers?

3 A Yes.

4 Q Okay. Can you read the -- you testified earlier that
5 item 2 on the first one is \$2,661,238.95; is that right?

6 A Yes.

7 Q And could you read for us what item 2 says in the
8 version you submitted to the worker's comp insurer?

9 A \$959,222.12.

10 Q Did you submit, each time you submitted 941s to
11 insurers, was the figure lower as it is in these two
12 Exhibits?

13 A Yes.

14 Q In this instance, it's lower by about what percentage
15 roughly?

16 A Sixty.

17 Q Sixty percent.

18 When you received phone calls -- well, I believe
19 you testified earlier that the auditors would call you,
20 contact you about audits, is that correct?

21 A The normal procedure is they would send a letter to
22 Daily King, Pro Temp or Precision Temp, being whichever
23 respectively, stating they want to come out and do an audit.
24 They give you on that same letter, the policy year, they
25 give you the date and time that they want to come out, and

1 they give you a list of documents that they would like
2 available to them at the audit.

3 Q Okay. Where were the audits performed?

4 A Most of the audits were performed in my house.

5 Q Was there a reason for that?

6 A Yeah. We didn't want the auditors to be in the
7 building.

8 Q Who didn't want them to be in the building?

9 A Dan.

10 Q Is that something Dan told you?

11 A Yes.

12 Q Were there ever delays in setting up these audits?

13 A Yes.

14 Q Okay. What were the reasons for the delays?

15 A To make sure all the records were ready for them to look
16 at.

17 Q Because of that, did you ever have to call the auditors
18 to postpone the audit?

19 A I'm sure I did.

20 Q Now, this process of submitting lower 941s to the
21 auditors that tied out to the lower payroll figures you gave
22 them, is that something that continued right up until the
23 point that the FBI and IRS searched Daily A. King's offices?

24 A Yes.

25 Q Did the auditors ever ask you about workers who were

1 injured on the job?

2 A Yes.

3 Q Okay. What kinds of questions did they ask you about
4 that?

5 A Well, part of the audit was to verify the person that
6 filed a claim for injury was actually working where they
7 said they were working on that specific day.

8 So they would look to find a portion of a payroll
9 check or something for that person on that particular week's
10 payroll when they got hurt.

11 Q What would you do to respond to those inquiries?

12 A When the numbers were prepared for the insurance
13 company, you'd make sure that there was payroll listed for
14 that particular week for that particular company where the
15 person was working and filed the claim.

16 Q Did you have to fabricate documents to do that?

17 A Did I? No.

18 Q Okay. Did anyone else?

19 A One time.

20 Q Who was that? Who did that?

21 A Aimee King.

22 Q All right. And to whom did she present those documents?

23 A Who did she give them to?

24 Q Yes.

25 A Michael Powers.

1 Q Okay. And that was in connection with what?

2 A An injury at a company in Plymouth.

3 Q Were there -- did you ever make arrangements to have
4 injured workers treated without making insurance claim?

5 A Yes.

6 Q How did that work?

7 A In the New Bedford area, there were two clinics that we
8 made arrangements to bring any of the workers that may have
9 cut their finger or injured themselves for minor issues to
10 these clinics to get medical treatment.

11 Q Okay. Was there a reason insurance claims weren't made?

12 A The reason the claims wouldn't be made is so that the
13 calculation of the premium would not be modified or impacted
14 by the frequency of occurrences.

15 So by paying your claims, small ones like that
16 directly, the frequency does not change your workman's comp
17 rate.

18 Q Did you have discussions with either Dan or Aimee about
19 this?

20 A I don't recall.

21 Q You've testified at length about the false IRS documents
22 that you filed, the false documents that you submitted to
23 worker's comp insurers. For whose benefit did you file
24 those, file and submit those documents?

25 A The company's benefit.

1 Q Okay. And the owners of the company?

2 A Who are they? The one who owns Daily King Labor is
3 Aimee King.

4 Q You filed documents in Daily A. King's name?

5 A Yes.

6 Q And did you file false, file and submit false documents
7 on behalf of Pro Temp?

8 A Yes.

9 Q And who again is the boss of Pro Temp?

10 A Dan and I.

11 MR. MITCHELL: That's all; Your Honor.

12 THE COURT: Okay.

13 CROSS-EXAMINATION

14 BY MR. DELINSKY:

15 Q Do you want any water, Mr. Wallace? Are you all set?

16 A I'm all set right now, thank you.

17 Q Before you testified --

18 MR. DELINSKY: Could you remove the items on
19 the screen?

20 MR. MITCHELL: Just hit escape right there.

21 Q Mr. Wallace, before you testified yesterday, did you
22 have any meetings with the government to prepare for your
23 testimony?

24 A Yes.

25 Q Okay. How many meetings?

EXHIBIT TWO

1 with you.

2 A Okay.

3 Q And it states that Paul Levenson was present?

4 A Yes.

5 Q Can you read paragraph 1 to yourself.

6 A (Witness complies.)

7 Okay.

8 Q Now, after reading paragraph 1 to yourself, isn't it
9 true that you told the Internal Revenue Service that you did
10 not underestimate the payroll amounts during this period that
11 you were supplying tax returns to Reliance?

12 A Yes.

13 Q That's what you said to the Internal Revenue Service?

14 A Yes.

15 Q Was that the truth?

16 A I believe it was.

17 Q Yesterday you were asked questions by the prosecutor
18 about workmen's compensation insurance, correct?

19 A Yes.

20 Q Previously to working for the McElroys commencing
21 sometime in early 1991, had you participated in thousands of
22 workers' compensation insurance audits?

23 A I don't know about thousands, but there would have been
24 numerous in the course of my prior employments.

25 O So you had experience then with workmen's compensation

1 insurance audits, correct?

2 A Yes.

3 Q And you had participated in lots of them on behalf of
4 the clients that you were representing?

5 A The accounting firm I was representing, yes.

6 Q Well, the accounting firm was representing --

7 A Various people.

8 Q -- people, and they had workmen's compensation
9 insurance; and there was an audit by their company, and you
10 would participate in that audit on behalf of the client of
11 the accounting firm?

12 A Yes.

13 Q And you knew, as a result of that participation, that
14 insurance auditors rely on 941 returns provided by the
15 client and do not match them with 941s filed with the
16 Internal Revenue Service?

17 A Is that a question?

18 Q Well, is that what you knew?

19 A Yes.

20 Q As a result of participating in these audits?

21 A I didn't know what the insurance company does at their
22 end with the copies of the 941s.

23 Q Well, did you ever tell the Internal Revenue Service on
24 or about November 13, 2007, that Wallace knew insurance
25 auditors rely on 941 returns provided by the client and do

1 not match them with 941s filed with the IRS?

2 A I remember saying that.

3 Q Now, you had, prior to the time you began working with
4 the McElroys, as you said, experience with these workmen's
5 compensation audits, workmen's compensation insurance
6 audits, correct?

7 A Yes.

8 Q And you knew the process by which premiums were
9 calculated, the -- like you testified to, the initial
10 estimated payroll amount of premium, then the
11 end-of-the-year premium, and then the audit and things like
12 that. Do you remember?

13 A Yes.

14 Q Because you had participated in those, correct?

15 A Yes.

16 Q Do you remember -- isn't it a fact, sir -- is it true
17 that on one occasion you met with the McElroys and that you
18 told them that you recommended creating fictitious 941s to
19 show the insurance auditors in order to reduce insurance
20 premiums? Did you tell that to the McElroys, that that's
21 what your recommendation was?

22 A That's not what I said.

23 Q Well, did you meet with Mr. and Mrs. McElroy at their
24 house on occasion and have coffee and talk about business?

25 A Yes.

1 Q And at one of these coffees did you mention that you had
2 been through thousands of workers' compensation insurance
3 audits, and with that experience he recommends creating
4 fictitious 941 returns to show the insurance auditors and
5 reduce insurance premiums?

6 A I can't answer that with a simple yes or no.

7 Q Did you say that, though, to the Internal Revenue
8 Service?

9 A I don't know the exact words that I used, but I did talk
10 about it with them.

11 MR. DELINSKY: May I approach, Judge?

12 THE COURT: You may.

13 Q This reflects an interview of you by the Internal
14 Revenue Service on November 13, 2007; isn't that correct?

15 A That's what's it says, yes.

16 Q And in attendance at that was yourself, your attorney,
17 Assistant United States Attorney, Sarah Walters and
18 Assistant United States Attorney Jon Mitchell, Special Agent
19 Nancy McCormick of the FBI, Thomas Demeo of the IRS, Anthony
20 DiPaulo [ph.] insurance fraud investigator, and Kate
21 Mulligan of the Insurance Fraud Bureau, investigator.

22 Is that what this reflects? All those people were
23 all there?

24 A That's what it says.

25 Q Big, big meeting. Two Assistant United States

1 Attorneys, the FBI and IRS there, correct?

2 A That's what it says.

3 Q And your attorney was there, correct?

4 A That's what it says.

5 Q Can you read paragraph 11 to yourself, and read it on
6 this page and go to the next page.

7 A (Witness complies.)

8 Okay.

9 Q Did you read that?

10 A Yes.

11 Q Okay.

12 Now, you agree November 13, 2007, is approximately
13 three months ago?

14 A Yes.

15 Q During that meeting with all those law enforcement
16 agents, did you state that you told the McElroys that you
17 had been through thousands of workmen's compensation
18 insurance audits?

19 A Yes.

20 Q And that with that experience you recommended creating
21 fictitious 941 returns to show the insurance auditors and
22 reduce insurance premiums? Is that what you said to the
23 IRS?

24 A Yes.

25 Q Now, with that presentation that you made with to the

1 McElroys, did you also tell them at that time that Wallace
2 knew insurance auditors rely on 941 returns provided by the
3 client and do not match them with 941s filed with the IRS?

4 A That was my correct statement there.

5 Q That's what you had said to them?

6 A Yes.

7 Q And after that presentation, you told the IRS the
8 McElroys said nothing; isn't that correct?

9 A I can't answer that with a simple yes or no.

10 Q You didn't report at that meeting with the Internal
11 Revenue Service and that whole bevy of federal law
12 enforcement agents that either Mr. McElroy or Mrs. McElroy
13 said anything, correct?

14 MR. MITCHELL: I'm objecting, your Honor.

15 This is mischaracterizing the statement.

16 THE COURT: Correct it on redirect.

17 Q Can you answer my question?

18 A What was the question again.

19 MR. DELINSKY: Mr. Stenographer, would you be
20 so kind as to read it back?

21 (Question read.)

22 A I can't answer that with a simple yes or no.

23 Q All you said, sir, was, McElroy approved Wallace's idea
24 with a nod of the head?

25 A That's what I said.

1 Q That's what you said?

2 A Yes.

3 Q A nod of the head isn't talking, is it?

4 A No.

5 Q So after this presentation, neither Mr. McElroy nor
6 Mrs. McElroy said anything, correct?

7 A Correct.

8 Q And all you said is that Mr. McElroy made a nod of the
9 head?

10 A Yes.

11 Q And as a result of that, you then went out and started
12 to fabricate 941s, correct?

13 A I can't answer that with a simple yes or no.

14 Q You did fabricate 941s, didn't you?

15 A I did do that, yes.

16 Q Now, I just want to -- Precision Temp Corp had its own
17 clients, correct?

18 A Yes.

19 You mean customers?

20 Q Yes.

21 A Yes.

22 Q These would be customers who Precision Temp Corp billed
23 directly, correct?

24 A They had those, yes.

25 Q So, in other words, Precision Temp Corp would employ

EXHIBIT THREE

1 your Honor?

2 (Pause in proceedings.)

3 MR. MITCHELL: You can put 314 aside.

4 May I just have a moment to get -- so we don't get
5 the exhibits shuffled, your Honor?

6 THE COURT: Yes.

7 (Pause in proceedings.)

8 BY MR. MITCHELL

9 Q Turn to Exhibit 410.

10 By the way, before we leave 314, the cash payroll
11 that's laid out there that's accounted for in that exhibit,
12 any of that cash reported to the IRS?

13 A The cash payroll?

14 Q Yes.

15 A It was reported for contract labor on the tax returns.

16 Q Was it reported on the 941s?

17 A No.

18 Q Was it reported to the workers' comp insurers?

19 A No.

20 Q Do you have 410 in front of you?

21 A Yes.

22 Q Would you take a moment to look at that?

23 You can take it out of the sleeve.

24 A Okay.

25 Q Do you recognize 410?

EXHIBIT FOUR

1 the workers, place them with a company, bill the company on
2 Precision Temp Corp letterhead, and receive a check from
3 the company and deposit it in a Precision Temp Corp bank
4 account, correct?

5 A Yes.

6 Q And that was true also of Pro Temp, correct?

7 A Yes.

8 Q And Pro Temp and Precision Temp Corp individually had
9 numerous clients?

10 A Yeah, okay.

11 Q Well, is it true, they had numerous clients that they
12 did the direct billing for?

13 A Yes.

14 Q And then for some clients that were Daily A. King
15 clients, Daily A. King would pay directly Pro Temp or PTC
16 for subcontracting with PT or PTC's employees, correct?

17 A They would pay some monies over, yes.

18 Q Those monies that Daily A. King paid over to either Pro
19 Temp or to PTC, those amounts were reflected on Daily A.
20 King's tax returns, correct?

21 A Which tax returns?

22 Q Their, I think, 1140S or 1040S?

23 A I don't believe they ever filed those.

24 Q Let me get the correct file for you.

25 A Okay.

1 Q 1120Ses?

2 A 1120S, yes.

3 Q Tell me what an 1120S is?

4 A It is a form of a corporation. The correct full name if
5 it is subchapter s corporation.

6 Q And on behalf of Daily A. King, every year you would
7 file one of these tax returns?

8 A Yes.

9 Q And on these tax returns you would reflect the amount of
10 money that Daily A. King provided to either Pro Temp or PTC
11 or both, correct?

12 A Yes.

13 Q And those numbers that you reflected on those tax
14 returns were correct?

15 A They were based upon the checkbooks of Daily A. King.

16 Q Correct.

17 And these were checks that you said that were
18 either made out directly to PTC, Pro Temp, or to specific
19 individuals, correct?

20 A Correct.

21 Q And you would add all those up, and you would reflect
22 those on Daily A. King's tax returns, correct?

23 A On their corporate return, correct.

24 MR. DELINSKY: May I approach, Judge?

25 THE COURT: You may.

1 (Counsel conferred.)

2 Q I'm going to show you, sir, what's been marked as
3 Exhibit 135, which is an income tax form 1120S filed on
4 behalf of Daily A. King; is that correct?

5 A That's correct.

6 Q And your signature is on it?

7 A Yes.

8 Q And Mrs. King's signature is on it, correct?

9 A Yes.

10 Q She's signing as President?

11 A Yes.

12 Q And you prepared this tax return?

13 A Yes.

14 Q You gave it to her, correct?

15 A Yes.

16 Q And it shows for calendar year 1994 Daily A. King had
17 gross sales of \$7,730,729, correct?

18 A Yes.

19 Q Now, on page -- on a separate page, referring to
20 line 19, "other deductions," you put "outside agency fee,"
21 \$1,520,806, correct?

22 A Correct.

23 Q And that figure for 1994 represents the checks that
24 Daily A. King issued to Pro Temp and to individuals on
25 behalf of Pro Temp, correct?

1 A And on behalf of themselves, too, yes.

2 Q Well, you said that there were checks cut to yourself,
3 to Mr. Trieu, and to other individuals. That's what I was
4 referring. Those checks were counted in there?

5 A They were part of that number, yeah.

6 Q Yes, yes.

7 A Not those checks, because those would be '99 and '98.

8 Q But in 1994, whatever checks you found in the checkbook,
9 you reflected them here --

10 Correct?

11 A That's correct.

12 Q -- to the Internal Revenue Service that Daily A. King
13 paid in outside agency fees the amount of \$1,520,000,
14 correct?

15 A That's correct.

16 Q Now, the monies that Daily A. King issued to Pro Temp in
17 1994, it was the responsibility of Pro Temp to reflect that
18 \$1,500,000 on Pro Temp's tax returns, wasn't it?

19 A If it was all for Pro Temp.

20 Q If it was all for Pro Temp, Pro Temp had a
21 responsibility to reflect that, didn't it?

22 A That's correct.

23 Q And you prepared Pro Temp's tax returns, didn't you?

24 A I believe I did one year, maybe two.

25 Q Didn't you prepare the tax returns --

1 A No. That was a sole proprietorship owned by Dich Trieu.
2 So there would not be a separate corporate tax return like
3 this.

4 Q I know, but wouldn't it reflect the gross sales of a
5 sole proprietorship where Dich Trieu would have to report
6 the gross sales of his sole proprietorship?

7 A He would.

8 Q So it should be been reflected on his personal return,
9 correct?

10 A Whatever monies Pro Temp got out of the million five,
11 yes.

12 MR. DELINSKY: I would like to just offer
13 Exhibit 135.

14 MR. MITCHELL: No objection.

15 MR. DELINSKY: It's already in --
16 (Counsel conferred.)

17 THE COURT: This has been previously marked by
18 the government?

19 MR. DELINSKY: Yes, but it hasn't been put
20 into evidence yet.

21 MR. MITCHELL: Correct.

22 MR. DELINSKY: So I'm now the moving the
23 Government's Exhibit 135 into evidence.

24 THE COURT: Very well.

25 **(Government's Exhibit No. 135 received in**

evidence.)

BY MR. DELINSKY

Q Let me ask you, sir. Exhibit 136, is that Daily A. King's 1120S tax return for the year ending in 1995?

A Yes.

Q And it's signed by both you and Mrs. King, correct?

A **Correct.**

Q And you're signing as tax preparer, correct?

A Correct.

Q And for 1995, Daily A. King's gross sales were \$11,825,516, correct?

A Correct.

Q And in getting that figure, you included in that gross figure initially to calculate that amount of money that was subsequently deducted for contract labor, correct?

A That was made up of bank deposits.

Q Let me just ask you, sir.

On the last page of the return under "outside service agencies," it reflects payments of \$1,346,900, correct?

A Correct.

Q That million three -- that \$1,346,000 is included in the \$11,825,000, correct, because that was money coming into Daily A. King?

A No. The 1,346,900 was an expense.

1 Q That's right.

2 A It wasn't an income. It was an expense.

3 Q That's right. It became a deduction off of that
4 \$11 million?

5 A That's correct. It became a deduction.

6 Q In other words, they have to have the million
7 300-some-odd thousand dollars in their possession in order
8 to pay it out, correct?

9 A Absolutely.

10 Q And they paid it out in the form of outside agency fees
11 to Pro Temp?

12 A And others.

13 Q And you reflected that on that return, correct?

14 A In the 1,346,900.

15 Q You reflected that?

16 A Yes, correct.

17 MR. DELINSKY: I'm going to move this into
18 evidence, 136, Government's Exhibit 136. It's already
19 premarked.

20 (Government's Exhibit No. 136 received in
21 evidence.)

22 BY MR. DELINSKY

23 Q With respect to, sir -- the next tax return is an 1120S
24 for Daily A. King for the year 1996, correct?

25 A Correct.

1 Q Again signed by you and Mrs. King, correct?

2 A Correct.

3 Q And it shows gross sales of 14,568,550, correct?

4 A Correct.

5 Q And on "other deductions - outside services" it reflects
6 \$1,662,516, correct?

7 A Correct.

8 Q And those were reflected in those checks which you've
9 previously described, correct?

10 A Some of those checks were that, yes.

11 Q Well, I thought you said you added up all the checks,
12 and you got that figure of all the checks that were made out
13 to these individuals?

14 A I thought you meant the checks that were entered by
15 Mr. Mitchell in front of me the other day.

16 Q Oh, no, no.

17 I am sorry, sir.

18 A That's what I --

19 Q Let me clarify it.

20 So in order for you to get that million --

21 I'm sorry, my memory --

22 A That's okay.

23 Q Thank you.

24 (Laughter.)

25 Q Outside expense, \$1,662,516. You took the Daily A. King

1 checkbook and added up all the checks that were issued to
2 Pro Temp and to individuals who you said would get these
3 checks and cash them, correct?

4 A Not necessarily me saying, Go cash them.

5 Q No, no, no. I understand that. It was the checks.

6 A It was all checks that were classified as contract --

7 Q -- labor?

8 A Correct.

9 Q And those checks -- and the total amount of those checks
10 were reflected on Daily A. King's tax returns, correct?

11 A On the corporate returns, yes.

12 Q Yes, yes.

13 A Yes.

14 Q And Daily A. King was saying on those tax returns, this
15 is the amount of money we are sending out as an agency to
16 other agencies or agencies for contract labor services,
17 correct?

18 A Correct.

19 Q That's what the tax return says, right?

20 A Correct.

21 MR. DELINSKY: I would like to move in 137.

22 MR. MITCHELL: No objection.

23 (Government's Exhibit No. 137 received in
24 evidence.)

25 BY MR. DELINSKY

1 Q Now, I'm going to move along, sir.

2 A Okay.

3 Q Exhibit 138 is for the year 1997. Another 1120S signed
4 by you and Mrs. King, correct?

5 A Correct.

6 Q And it reflects gross sale of \$16,230,457, correct?

7 A Correct.

8 Q Okay.

9 Now, outside services, \$2,203,890, correct?

10 A Correct.

11 Q And that 2-million-plus amount then becomes a deduction
12 off of that \$16 million gross sales, correct?

13 A Correct.

14 Q Because that money, the tax return reflects, is leaving
15 Daily A. King to another agency, correct?

16 A Correct.

17 MR. DELINSKY: I'd like to offer Exhibit 138.

18 (Government's Exhibit No. 138 received in
19 evidence.)

20 BY MR. DELINSKY

21 Q I'm now going to show you, sir, Exhibit 139, 140, and
22 141, and 142.

23 A Okay.

24 Q Just so I can identify these for the record.

25 Exhibit 139 is the 1120S for 1998 with your

1 signature and Mrs. King's, correct?

2 A Correct.

3 Q It reflects gross sale of \$14,637,508, correct?

4 A Yes.

5 Q And off of that was deducted outside services of

6 \$2,335,250, correct, for outside agency services, correct?

7 A Correct.

8 Q With respect to Exhibit 140, taxable year 1999, 1120S,

9 gross sales for Daily A. King, \$10,493,716, correct?

10 A Correct.

11 Q Outside agency -- outside services, \$2,267,725, correct?

12 A Correct.

13 Q And this tax return is also signed by you and Mrs. King,

14 correct?

15 A Correct.

16 Q Just to complete this, Exhibit 141 is the 1120S for the

17 year 2000?

18 A Yes.

19 Q Signed by you and Mrs. King?

20 A Yes.

21 Q Which reflects gross sales of \$9,718,521, correct?

22 A Yes.

23 Q And it shows under outside services \$2,123,396, correct?

24 A Correct.

25 Q And Exhibit 142 is the 1120S for 2001, showing gross

1 sales for this year of \$4,331,980, correct?

2 A Correct.

3 Q Signed by both you and Mrs. King, correct?

4 A Correct.

5 Q And under outside services, \$1,129,091, correct?

6 A Correct.

7 Q And in order for you to calculate those outside
8 services, you went to the checkbook, and you calculated the
9 amount of the checks, correct, based on certain categories?

10 A Correct.

11 MR. DELINSKY: I would like to move in these
12 exhibits, 139, 140, 141 and 142.

13 (Government's Exhibit No. 139 received in
14 evidence.)

15 (Government's Exhibit No. 140 received in
16 evidence.)

17 (Government's Exhibit No. 141 received in
18 evidence.)

19 (Government's Exhibit No. 142 received in
20 evidence.)

21 MR. DELINSKY: Your Honor, I'm about to go
22 onto another topic. Can we take the break now?

23 MR. ZALKIND: Can we take the break a little
24 early, or I'll walk out and come back?

25 MR. DELINSKY: No. I don't want you to leave.

1 THE COURT: Are you moving to another subject?

2 MR. DELINSKY: Yes.

3 THE COURT: All right, jurors, we'll take the
4 morning recess.

5 MR. ZALKIND: Thank you.

6 MR. DELINSKY: Thank you.

7 THE CLERK: All rise.

8 Court is in recess.

9 (Whereupon, the jury left the courtroom.)

10 (Recess.)

11 (Whereupon, the jury entered the courtroom.)

12 THE CLERK: All rise for the Honorable Court.

13 Court is open. You may be seated.

14 THE COURT: Mr. Delinsky.

15 BY MR. DELINSKY

16 Q Now, Mr. Wallace, is it fair to say that the Daily A.
17 King Labor checks to Trieu, Van Son, Wallace, Pro Temp and
18 PTC were deducted on Daily A. King's tax returns as
19 "subcontract labor"?

20 A As well as others, yes.

21 Q Daily A. King paid Pro Temp and PTC by check, correct?

22 A That's correct.

23 Q And Pro Temp and Precision Temp Corp deposited those
24 checks into their own business accounts and included the
25 income in their gross receipts computation?

1 A Yes.

2 Q And the 1120S tax returns that we just reviewed for
3 Daily A. King Labor, you prepared those corporate tax
4 returns and you did not discuss those returns with
5 Mr. McElroy or Mrs. King before they were signed; isn't that
6 correct?

7 A I can't answer that yes or no.

8 Q Sir, isn't it fair that on November 13, 2007, you told
9 Special Agent Demeo of the IRS, Wallace also prepared the
10 quarterly employment tax returns -- strike that.

11 Wallace prepared DAK's corporate return 1120Ses.
12 Wallace deducted the cash payroll as outside services or
13 contract labor. Wallace did not discuss the returns with
14 McElroy or King.

15 Is that --

16 A That's correct.

17 Q Is that what you told the government?

18 A Yes, I did.

19 Q Now, Mr. Wallace, currently you have unpaid taxes owed
20 to both the State of Massachusetts and to the Internal
21 Revenue Service, correct?

22 A Yes.

23 Q And, in fact, there are tax liens on your home by both
24 the state and federal government, correct, for unpaid taxes?

25 A Correct.